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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 92

UNITED STATES OF AMERICA — *Appellant*

vs.

CHARLES T. HVASS — *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

APPELLEE'S BRIEF

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OPINION BELOW

The memorandum decision of the District Court (R. 5-10) is reported at 147 F. Supp. 594.

QUESTION PRESENTED

Does an allegedly false statement of a material fact, made in a proceeding held pursuant to a local rule of the district court, constitute perjury within the meaning of *18 U. S. C.*, §1621, when the court which made the rule has construed it as not intended to be "a law of the United States authoriz(ing) an oath to be administered" within the meaning of the statute?

SUMMARY OF ARGUMENT

1. Since the holding of the court below was that Local Rule 3 of the district court is not "a law of the United States authoriz(ing) an oath to be administered", the holding necessarily delimited that phrase as used in the perjury statute, *18 U. S. C.*, § 1621. This court has previously held in such a situation that an act of Congress has been construed, and thus that the court has jurisdiction under the Criminal Appeals Act. *18 U. S. C.*, § 3731. But the situation in this case, where the trial court has recognized the scope of the statute but has held that its own rule does not come within it, goes beyond anything in the precedents and does not represent the evil Congress sought to reach in the Criminal Appeals Act. The court may wish to consider whether review in the usual fashion by the Court of Appeals is not to be preferred to extension of the unique jurisdiction of the Criminal Appeals Act to such a situation.

2. Administration of the oath to appellee cannot be justified, if at all, except by Local Rule 3. When appellee testified, the court stated that his testimony was taken pursuant to Local Rule 3. The indictment alleges that the testimony was pursuant to Local Rule 3. Even if some other authority for taking such testimony from appellee exists, the government cannot rely on it at this stage, when no such authority was claimed at the time the testimony was given or in the indictment.

In any event, no other authority does exist. The statute authorizing judges to administer oaths, *28 U. S. C.*, § 459, makes a judge a competent officer. It does not have any bearing on the other element of a perjury prosecution, that the case be one in which a law of the United States authorizes an oath to be administered. Such inherent powers as a court may have to require testimony under oath are limited to judicial proceedings before the court. The trial

court has construed the indictment as charging false testimony in an administrative, rather than a judicial, proceeding. The trial court's construction of the indictment is binding on this court on an appeal pursuant to the Criminal Appeals Act—*United States v. Borden Co.* (1939), 308 U. S. 188, 193— and the authorities support the trial court's view that an application for temporary permission to participate in a case is an administrative proceeding. *Brooks v. Laws* (D. C. Cir. 1953), 208 F. 2d 18.

3. In determing whether an administrative regulation is a "law of the United States" wit' in the meaning of a statute, no fixed rule applies. Such a regulation may or may not be a "law of the United States", depending on the structure of the statute and on the intention of the body which authorized the regulation. *United States v. Howard* (1957), 352 U. S. 212, 216-7. In this case the trial court has construed Local Rule 3 as not intended to invoke the perjury penalty. The construction by the trial court of a rule it made itself is binding. *Duncan's Heirs v. United States* (1833), 7 Pet. 435, 451-2.

The construction by the trial court of its own Local Rule 3 is reasonable. It avoided otherwise serious questions as to the validity of the rule. And it yields the practical result that the rule may still be relied on by the court in determining which non-resident attorneys will be granted permission to participate in cases before it, while at the same time it is left to the authorities of the bar to which the non-resident attorney belongs to determine whether his testimony was truthful, rather than having these matters decided by a perjury trial in a federal court in a district other than that in which the attorney resides.

ARGUMENT

I.

Jurisdiction of this court.

As required by Rule 16(4) of the Revised Rules of this court, we first address ourselves to the question of jurisdiction. Jurisdiction in this case must rest, if at all, on the Criminal Appeals Act of 1907, *18 U. S. C.*, § 3731. The purpose of that statute is stated in *Frankfurter and Landis, The Business of the Supreme Court* (1928), 120:

> "The reasons which impelled the enactment of the Act of 1907 remain. They will continue to be controlling. Congress is not apt to give the power of invalidating its legislation wholly to the inferior federal courts without an appeal as of right to the Supreme Court, and Congress is still less likely to do this with regard to criminal legislation. The criminal law is increasingly resorted to, for the 'achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*' The defeat of these purposes is not likely to be entrusted to any tribunal other than the Supreme Court."

The order of the district court in the present case did not, on any view, invalidate Congressional legislation nor thwart the achievement of some social betterment which the legislative branch has sought. Instead the trial court held only that its own local rule is restricted in purpose and effect, and that the rule which the trial court has power to make, interpret, amend, repeal, enforce or not enforce was not intended to substitute perjury trials for the customary methods of disciplinary action against lawyers.

We concede, as we did before (Motion to Affirm, p. 5), that this court has held that a decision that a particular administrative regulation is or is not a "law of the United States" within the meaning of the perjury statute is, techni-

cally, a construction of the statute, and gives jurisdiction to this court under the Criminal Appeals Act. *United States v. George* (1913), 228 U. S. 14. But neither the *George* case nor any other we have found involves the unusual situation presented by the present case, where the trial court is construing a rule it has made itself. Thus the court may wish to consider whether it should extend to such a situation as this "the unique jurisdiction of the Criminal Appeals Act of 1907, as amended, whereby decisions of district courts raise almost abstract questions of law regarding the invalidity or construction of criminal statutes, in that they do not come here in the setting of normal adjudications on the merits of a controversy." *United States v. Congress of Industrial Organizations* (1948), 335 U. S. 106, 127 (concurring opinion).

II.

Administration of the oath to appellee cannot be justified except by Local Rule 3 of the district court.

The bulk of the government's argument (Brief, pp. 8-13) is an attempt to justify administration of the oath to appellee, and thus the validity of the indictment, without reference to Local Rule 3 of the district court. The government argues that the proceeding in which appellee took the oath was a judicial proceeding, and claims that administration of the oath in such a proceeding is authorized either by *28 U. S. C.*, § 459, which empowers judges to administer oaths, or by the common law.

There are two decisive objections to this line of argument. (1) Even if some authority other than Local Rule 3 exists, the government cannot rely on it now, since at every stage in the proceedings below Local Rule 3 was the only authority specified for administration of the oath. (2) In any event, there is no authority other than Rule 3

which is relevant here. The oath was administered in an administrative proceeding, while any "inherent powers" the court may have had are applicable only in judicial proceedings.

1. The present indictment charges appellee with having committed perjury in a hearing held "under and pursuant to the provisions of Rules 3 and 8, Local Rules of the United States District Court, Northern District of Iowa" (R. p. 1). This allegation of the indictment fairly summarizes the events which led up to it, for from beginning to end the court treated the hearing at which appellee testified as one authorized by Local Rule 3 (R. 7). At no time did the judge who conducted the hearing suggest that he was exercising any authority other than that granted by Local Rule 3. Thus even if the court had some power other than that granted by Local Rule 3 to examine appellee and to administer an oath to him, it did not attempt to exercise any such power in this case.

Only last term this court twice held that due process requires that a witness be informed so that he may determine whether a question is authorized before being compelled to answer it. *Watkins v. United States* (1957), 354 U. S. 178; *Sweezy v. New Hampshire* (1957), 354 U. S. 234. And an indictment for contempt of a committee of Congress has been dismissed because it failed to show that the inquiry was within the scope of the authority granted to the committee. *United States v. Lamont* (2d Cir. 1956), 236 F. 2d 312. If an indictment is fatally defective for failure to show the authority pursuant to which questions were asked, it must be equally defective when it alleges an insufficient authority. Appellee, who was told that he was being interrogated pursuant to Local Rule 3, cannot now be tried for perjury on the theory that some vague common law powers supported his interrogation.

2. In any event, there is no authority for administration of an oath such as that taken by appellee except such power as may stem from Local Rule 3.

The government's reliance on *28 U. S. C.*, § 459 may be quickly disposed of. The short of the matter is that no judge administered an oath to appellee. Instead, as the indictment alleges, the oath was administered by the clerk of the district court (R. 1). It is true that a statute not cited by the government, *28 U. S. C.*, § 953, authorizes clerks of court to administer oaths. But this mistake as to the relevant statute highlights the fact that the purpose of both §§ 459 and 953 of the Judicial Code is to make certain classes of officers competent to administer oaths. Neither statute purports to, nor does, delineate the cases in which such a competent officer is to administer the oath.

The perjury statute, *18 U. S. C.*, § 1621, requires *both* that the oath be administered by a competent tribunal, officer or person, *and* that the case be one in which a law of the United States authorizes an oath to be administered. Appellee has never challenged the competency of the clerk to administer the oath. His challenge runs to the second element, and as to this § 953 of the Judicial Code is irrelevant.

Nor is the government's case strengthened by its appeal to "inherent" or "common-law" powers of the court. This court held long ago that a federal judge does not have a roving commission to examine anyone on any subject, his jurisdiction is limited to that granted by statutes and rules. *Ex parte Fisk* (1885), 113 U. S. 713. Whatever inherent powers a court has are confined to judicial proceedings. They are not applicable when the court acts extra-judicially, in a proceeding of an administrative nature.

Appellee does not contend that a clerk of court may not administer an oath in an administrative proceeding con-

ducted by a judge. But false swearing under such an oath constitutes perjury only where such oath was required by a "law of the United States". The common law power to require testimony under oath in a judicial proceeding is not a "law of the United States" authorizing an oath in an administrative proceeding.

The cases cited by the government (Brief, p. 12) hold nothing to the contrary. *Glickstein v. United States* (1911), 222 U. S. 139, 143, involved testimony expressly required by statute in a hearing before a referee in bankruptcy. *Goodman v. United States* (9th Cir. 1939), 108 F. 2d 516, is concerned with contempt, rather than perjury, an oath of secrecy rather than an oath to testify truthfully, and with the obviously judicial proceeding of a grand jury hearing. The only question in *United States v. Ambrose* (C. C., S. D. Ohio 1880), 2 Fed. 556, which even approaches the present case is whether a judge is a competent officer to administer the oath in question; and this court expressly refrained from considering that question when the case was certified to it. *United States v. Ambrose* (1883), 108 U. S. 336, 341.

A state prosecution under a statute similar, for present purposes, to *18 U. S. C.*, § 1621, furnishes a compelling analogy. Defendant pleaded guilty to a charge of illegally transporting intoxicating liquor. Before he was sentenced he was sworn, and examined by the presiding judge as to whether he had been arrested before. The state, believing his testimony on this subject to be untrue, indicted him for perjury, but it was held that his conviction on this charge could not stand. *State v. Larson* (1927), 171 Minn. 246, 213 N. W. 900. The court reasoned that the examination of the defendant after conviction had not been authorized by statute, and thus the testimony in question was extra-judicial. Nor could the perjury prosecution be sus-

tained on the basis of the court's power to administer an oath during trial, since that power had terminated with the plea of guilty. See similarly *State v. McCarthy* (1889), 41 Minn. 59, 42 N. W. 599.

In the present case the district court expressly found

> "Administration of the oath to Hvass was not a part of any judicial proceeding in the Wyrum and Lash cases, but rather was a part of an administrative proceeding by which the court sought to determine whether Hvass should be permitted to participate as an attorney in these cases." (R. 7)

This construction of the indictment by the district court, that it charges a false statement in an administrative rather than a judicial proceeding, is conclusive on this court.

> "This court must accept the construction given to the indictment by the district court as that is a matter we are not authorized to review."

United States v. Borden Co. (1939), 308 U. S. 188, 193; *United States v. Carbone* (1946), 327 U. S. 633.

Even if the trial court's construction of the indictment were not conclusive here, it is, in any event, well supported by the authorities. Thus see *Rosenthal v. State Bar Examining Committee* (1933), 116 Conn. 409, 415-6, 165 Atl. 211, 213-4:

> "Proceedings for the admission of attorneys are not actions or suits at law; they are in the nature of investigations by the courts or their representatives to determine whether particular candidates are qualified to become its officers. * * * Such an investigation, like that authorized by the statutes to determine the fitness of physicians and surgeons and other persons, to carry on professions or callings in which the public has such an interest as to bring them within the regulatory scope of the police power, is really administrative in its nature. * * * Courts or their

judges must of necessity perform many acts of an administrative nature, acts which so far pertain to the judicial department of the government that they could not properly be performed by the representatives of its other branches, as, for example, the appointment and removal of clerks of courts and other such officers; but in the method of the performance of such administrative functions, courts are under no more stringent limitations than are the executive or legislative departments in similar situations."

See also the statement by Cardozo, J., in *People ex rel. Karlin v. Culkin* (1928), 248 N. Y. 465, 479, 162 N. E. 487, 492. Far the fullest discussion of the question is in *Brooks v. Laws* (D. C. Cir. 1953), 208 F. 2d 18. The holding there, after an elaborate historical and analytical discussion, is that admission to the bar is "a ministerial act which is performed by virtue of the judicial power * * * rather than a judicial proceeding." This holding has since been followed in *In re Jacobi* (D. C. Cir. 1954), 217 F. 2d 668, and *Application of Wasserman* (9th Cir. 1956), 240 F. 2d 213, 214.

In summary, the express reliance on Local Rule 3 in the proceedings leading up to appellee's testimony and in the indictment preclude the government from now relying on any authority for the oath other than Local Rule 3, even if such other authority existed. And in view of the administrative nature of the proceedings, as declared both by persuasive decisions and by the binding construction of the indictment in the court below, there was, in fact, no authority to administer the oath save such as may be derived from its own Local Rule 3.

III.

Local Rule 3, as construed by the court which promulgated it, is not "a law of the United States authoriz(ing) an oath to be administered."

In the preceding section of this brief we have demonstrated that there is no "law of the United States authoriz(ing) an oath to be administered" to appellee in a proceeding such as that at which he testified unless Local Rule 3 of the district court be considered such a law.

In an earlier day the notion that an administrative regulation made by a single district court could be a "law of the United States" would not have been taken seriously.

> "* * * (N)o rule or regulation can become or have the force of law. Congress cannot, if it would, confer law-making power on the commissioner or secretary."

United States v. Bedgood (S. D. Ala. 1891), 49 Fed. 54, 58. And see *United States v. Manion* (D. Wash. 1890), 44 Fed. 800, 801. Today such decisions are of interest only to the antiquarian, for they speak from a time when the administrative process was in its infancy, and when rigid and comparatively naive notions of separation of powers were still in vogue.

Today it is well recognized that a regulation may have the force of law if the regulation has a clear legislative basis, *e. g., Viereck v. United States* (1943), 318 U. S. 236, 241, and is neither unreasonable, inappropriate or plainly inconsistent with the statute. *United States v. Obermaier* (2d Cir. 1950) 186 F. 2d 243, 247, cert. denied 340 U. S. 951 (1951). This modern understanding of what is meant by "law of the United States" has never been challenged by appellee, and was expressly accepted by the trial court in the present case.

> "* * * (W)e recognize that generally speaking a rule of court has the force of law."

(R. 10) Thus the trial court acknowledged the rule, as stated by this court in *Singer v. United States* (1945), 323 U. S. 338, 345, that there is no

> "fixed principle that a regulation can never be a 'law' for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute."

But in determining whether a *particular* regulation is a "law of the United States" within the meaning of a *particular* statute, there are not one, but two, variables which must be considered. Analysis of the regulation in question, its purpose and meaning, is needed to determine whether it comes within the concept of "law" as used in the statute. This is well illustrated by the recent decision in *United States v. Howard* (1957), 352 U. S. 212. The Federal Black Bass Act makes it unlawful for any person to deliver black bass or other fish for transportation from any state if such transportation is contrary to the "law of the State." *16 U. S. C.*, § 852. Defendant in that case had transported black bass contrary to a regulation of the Florida Game & Fresh Water Fish Commission. This made it necessary for this court to determine whether the regulation of the state commission was a "law of the State" within the meaning of the federal statute. The court first developed the modern understanding of "law", as we have set it out above. But then the court had to consider the other variable, the intention of Florida with regard to its regulation. The court said, at 216-7:

> "Here, it is beyond question that the Florida Legislature, in Fla. Stat. § 372.83, intended to and did make infraction of any commission regulation a violation of state law, punishable as a misdemeanor."

Thus the court held that violation of the regulation was a crime under the federal statute.

In our case the trial court has construed Local Rule 3 as not having been intended to serve as a predicate for a perjury prosecution. The court first defines the purpose of the rule, and says that this perjury indictment comes "after Rule 3 had served its purpose" (R. 9). Again the court says:

> "The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner." (R. 10).

If, as is freely conceded, the district court for the Northern District of Iowa has the power to make a rule with the force of "a law of the United States", it must also have the power to refrain from making "a law of the United States". This is what it has done in this instance, by authoritatively construing its own rule as not being "a law of the United States" within the meaning of *18 U. S. C.*, § 1621.

The construction which a district court puts on a rule which it has made itself is, save in rare instances, binding. The court which made the rule is in the best position to determine what the rule means and what it was intended to accomplish. And since that court has the power to amend or repeal its rule, a decision by some other court as to the meaning of the rule contrary to that of the court which made the rule would be a useless act.

Long ago this court said:

> "On a question of practice, under the circumstances of this case, it would seem that the decision of the district court, as above made, should be conclusive. How can the practice of the court be better known

> or established than by its own solemn adjudication on the subject?"

Duncan's Heirs v. United States (1833), 7 Pet. 435, 451-2. This principle, that the body which makes a rule can authoritatively define that rule, is true of regulations generally. Indeed the case just quoted from was cited by the court in support of its statement with regard to administrative rules in *Norwegian Nitrogen Products Co. v. United States* (1933), 288 U. S. 294, 325:

> "The Commission was without competence by any decision it might make to fix the meaning of the phrase as used by Congress or the courts. It had power, however, to interpret its own rules and any phrase contained in them."

And in *Federal Communications Comm. v. Pottsville Broadcasting Co.* (1940), 309 U. S. 134, 143, n.6, the court said bluntly that an interpretation by the F. C. C. of one of its Rules of Practice "is binding upon the courts".

As the Third Circuit puts it:

> "It has always been held that a court is the best judge of its own rules, and an Appellate Court will not reverse such construction, except where manifestly erroneous * * *."

Rose v. Columbian Reinforced Concrete Co., (3rd Cir. 1912) 193 Fed. 403, 404. The same doctrine is a commonplace also in the state courts. E. g., *Stanton v. Kinsey* (1894), 151 Ill. 301, 306, 37 N. E. 871, 872; *Evans v. Backer* (1886) 101 N. Y. 289, 292, 4 N. E. 516; *Dellaceasse v. Floyd* (1938), 332 Pa. 218, 224, 2 A. 2d 860, 863; *Wagner v. Edginton Coal Co.* (1925), 100 W. Va. 117, 120, 130 S. E. 94, 96.

It is of no significance that in this instance the district court for the Northern District of Iowa announced the meaning of its rule through a judge of another district, sitting by designation. A judge sitting by designation may hold a district court rule invalid. *Johnson v. Manhattan Co.* (1933), 289 U. S. 479, 503. *A fortiori* he must be able to construe such a rule. And in any event the action is that of the court, not of an individual judge. It makes no difference whether the rule of a court is construed by the judge who wrote it, by his successor in that district, or by a judge from another district sitting by designation. So long as the particular judge acts for the court, the authorities noted above are in point, and the construction put on the rule by the court is final and authoritative.

The trial court had sound reasons for construing Local Rule 3 as not "a law of the United States" for purposes of the perjury statute. As the court noted, Local Rule 3 is "unique and unusual" (R. 10). Indeed, so far as counsel could find, there is no other court in the country, state or federal, which asks an out-of-state attorney to prove under oath that he has never violated the canons of ethics as a condition to permitting him to participate, along with local counsel, in a specific case. In another case involving Local Rule 3, the Eighth Circuit said:

> "Rule 3 is vigorously assailed as being arbitrary, discriminatory, unreasonable, destructive of the rule of comity and ex post facto. We, however, deem it unnecessary to pass upon the validity of this rule * * *"

DeParcq v. United States District Court (8th Cir. 1956), 235 F. 2d 692, 699. A similar attack on the validity of Local Rule 3 was pressed with vigor by appellee in the present case. By construing the rule as not supporting an indictment for perjury, the trial court was, as it expressly

noted (R. 10) able to avoid passing on the question of validity.[1]

Surely it is not necessary to cite to this court authority for the proposition that courts from time out of mind have construed statutes and rules in a restrictive manner in order to avoid otherwise serious questions as to their validity.

There was particular reason for the trial court to give a restrictive construction to that sentence of Local Rule 3 which purports to authorize administration of an oath, since it is this sentence which is the target of the sharpest attack on the validity of the rule. The other sentences of the proviso to Local Rule 3 push the doctrine of classification to an extreme, since they require a showing of non-violation of the canons of ethics only from non-resident attorneys in personal injury and damage suits where the injured person was a resident of Iowa and was injured there, and even within this gerrymandered class leave it to the judge, in his unfettered discretion, to decide which attorneys are to be required to make such a showing. But the final sentence restricts the classification still further.

> "The court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath."

Surely this wears the cloth too thin. It exposes the arbitrary and discriminatory nature of the rule by indicating that it applies only to plaintiff's lawyer, and not to non-resident attorneys who appear for a defendant, and by

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[1] Although the decisions are not entirely consistent, it is appellee's understanding that this court will not consider, in an appeal under the Criminal Appeals Act, the question of validity on which the trial court did not pass. United States v. Borden Co. (1939), 308 U. S. 188, 206-7; United States v. Petrillo (1947), 332 U. S. 1, 15 (concurring opinion). For this reason the validity of the rule is not challenged here.

leaving it to the further discretion of the judge whether to require examination under oath of the unlucky plaintiff's attorney called upon to make a showing, or whether to be content with the attorney's assurances not given under oath.

Either through design or oversight, the government states in its brief "Moreover, there is no challenge to the fairness of the procedures which were followed" (Brief, p. 6); "Moreover, there is no challenge to the procedures which were followed" (Brief, p. 9). So that there will be no misunderstanding, the procedures followed by the local district court, pursuant to Local Rule 3, were challenged by appellee in his motion to dismiss the indictment. Among other challenges to the procedures established by and followed pursuant to Local Rule 3 were the following:

1. Local Rule 3 denies the right to a speedy and inexpensive trial.

We do not approve of a procedure that denied to Wyrum and Lash their right to a speedy and inexpensive trial as provided by Rule 1 of the *Federal Rules of Civil Procedure*. The practical effect of Local Rule 3 was to impose upon Wyrum and Lash the tremendous expense of paying the costs for subpoenaing witnesses to the hearings conducted pursuant to the local rule. They had their own expenses of travel, board and lodging to pay. Omitting any consideration of the value of the attorney's time, he was required to bear the cost of his own travel, board, lodging and other incidental expense. These costs rested upon the attorney and the clients. Three days were consumed in the taking of testimony at the hearings and the trials of the main actions were delayed by at least four weeks. The practical effect of this expense confronting the local resident and the non-resident attorney under Local Rule 3

in all instances *compels* the employment of a resident attorney *only*.

2. Local Rule 3 by its very application prevents its being attacked by the non-resident attorney in the appellate courts.

If temporary permission is granted no question is raised. But if denied the non-resident attorney's name is stricken from the record and a resident attorney substituted instead. If the case is settled the question is moot. If the case is tried and won then no question is involved. Whatever is done with the case thereafter, the non-resident attorney, not being a party to the action, has no standing in court to appeal from a final judgment and question the validity of Local Rule 3.

3. Local Rule 3, as it has been administered, allows the very party which is opposed to the claim in the main action to become a fact gathering body on the question of the non-resident attorney's ethics.

Investigators from the American Association of Railroads become the investigative arm under the procedure followed. The railroads' opposition to non-resident counsel becomes an accomplished purpose through its power of investigation. An investigation not aimed at a disclosure of the attorney's ethical conduct, but rather directed to the disclosure of evidence which questions the non-resident attorney's conformance with all the standards to be applied.

4. Local Rule 3 by its very wording casts an awesome shadow of doubt upon the innocence from wrong doing of the non-resident attorney and casts all burdens of proof upon him.

The local rule is contrary to our fundamental concept of justice that "one is clothed with innocence and not with guilt." It requires a task that borders on the impossible for any attorney to prove by a fair preponderance or by clear and convincing evidence or beyond a reasonable doubt or whatever unknown test the court may apply under the procedure established in Local Rule 3 that during his lawyer life he has not violated a standard of conduct in particular instances of which he is not apprised or accused until after he appears at the hearing. For no complaint, nor list of charges, nor bill of particulars, nor petition of grievances, nor any other form of notice whatsoever was furnished to the non-resident attorney prior to the actual reception of evidence during the hearing. It would seem that this type of procedure does violence to our concept of due process and to our concept of notice of charges so essential to a fair hearing.

5. Local Rule 3 imposes penalties ex post facto.

Local Rule 3 came into being at a time long after the Wyrum and Lash cases had been sued, docketed and were at issue. Not until August 31, 1955, did the court announce a local rule to be effective October 1, 1955, under which it might require non-resident attorneys to show under oath that they had not been guilty of violating any of the canons of ethics of the American Bar Association as a condition on their participation in the case. Thus the rule applies a penalty to conduct which was not present at the time the conduct took place, since appellee was not asked about any incident later than April, 1955, and all of the

incidents as to which he was examined occurred principally in previous years.

6. Local Rule 3 changes the burden of proof.

Local Rule 3, under the procedures followed, in effect does not require that any charge be proved against the non-resident attorney. On the contrary, it allows any charge to be made against the attorney at the hearing with which the attorney is not acquainted prior to the hearing. The burden is then imposed upon the attorney to disprove the charge, again by whatever test of burden of proof the local court desires. If the charge is met with denial, the scales of the burden then balance and, hence, the attorney has failed to disprove rather than the complaining party required to prove..

7. The procedure set forth in Local Rule 3 invites officious intermeddling.

A requisite showing pursuant to the local rule may be required on motion of a member of the bar of either district, thus any lawyer who belongs to the bar of the Iowa Federal Court is given the right to conduct an inquiry into the professional conduct of a non-resident attorney who seeks to participate in a particular case. The practical effect of such a procedure needs no illustration.

8. The procedures followed by the local court pursuant to Local Rule 3 required appellee's appearance at the hearings.

Although on its face Local Rule 3 appears to give some choice to the non-resident attorney whether or not to seek permission to participate in a particular case, the procedures followed under the local rule prove conclusively that the attorney has no choice in the matter. If his name

appeared on the pleadings of a case pending *prior* to the adoption of Local Rule 3, the non-resident attorney was required either to appear at the time and place set for the hearing under Local Rule 3, or in the alternative run the gauntlet of the contempt power of the local court. See *DeParcq v. United States District Court* (8th Cir. 1956), 235 F. 2d 692, 699.

We feel that the statements set forth in the government's brief are unwarranted and unfair, especially in view of the limited transcript of record that failed to include the numerous exhibits introduced and received by the lower court at the time of argument on the motion to dismiss. At this late date, because we did not anticipate such assertions by the government, the exhibits setting forth the procedures followed pursuant to Local Rule 3 are not before the Court. However, we could not allow the statements to go unchallenged.

There is nothing irrational or arbitrary about the construction the trial court placed on its rule in order to avoid the problems of validity which it would otherwise present. The court has held, in effect, that though the rule may call for an oath in *some* instances, it was not intended that the testimony thus taken should be subject to the penalties of perjury. This is not novel. Wigmore gives a number of examples of testimony which is taken under oath and admissible in a judicial proceeding, though it is not subject to the perjury penalty. *6 Wigmore, Evidence,* § 1832 (3rd Ed. 1940). A fairly common instance is an oral deposition in a civil case. Such depositions are taken under oath, *F. R. Civ. P. 30(c),* though only false testimony as to material matters is punishable as perjury, *18 U. S. C.,* § 1621, and examination on a deposition is not limited by the concept of materiality. *2 Barron & Holtzoff,* Federal Practice and Procedure 311-2 (1950).

On the construction made by the court here, Local Rule 3 remains, until further challenged, a rule of the local district court, which it can continue to apply in determining whether to grant a particular non-resident attorney permission to appear in a case. But it is not a "law of the United States" and perjury will not lie for a false statement under an oath administered pursuant to that rule.

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law: but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

United States v. Eaton (1892), 144 U. S. 677, 688. We recognize that the *Eaton* case, so far as it holds that the particular regulation involved would not support a criminal prosecution, turns on its peculiar facts. See *United States v. Howard* (1957), 352 U. S. 212, 215-6. We cite it here only because, so long as it is thought sound even on its own facts, it demonstrates that a regulation may be valid for internal purposes of the department which made it, though not given effect for purposes of a criminal prosecution. See similarly *Patterson v. United States* (9th Cir. 1910), 181 Fed. 970, 973; *United States v. Robertson* (S. D. Calif. 1919), 257 Fed. 195.

The rule, as construed by the court below, is practical and workable. The Iowa District Court is free to deny permission to appear in proceedings before it to any non-resident attorney who declines to be examined under oath, or whose testimony under oath fails to make a showing of

professional purity satisfactory to the court, or whose testimony under oath is believed by the court to be false. But it is then left to the appropriate authorities of the bar to which the attorney belongs to determine, by their usual procedures, whether the attorney has in fact violated the canons of ethics, and what action, if any, should be taken against him. There is an analogy here to the remark of Judge Fahy, dissenting in *Cammer v. United States* (D. C. Cir. 1955), 223 F. 2d 322, 330, reversed 350 U. S. 399 (1956):

> "In other words, I do not think Congress intended by § 401(2) to grant courts the power by summary proceedings to police such professional conduct of a member of the bar. The well known avenues for suspending, disbarring, or otherwise disciplining attorneys are available to reach their unprofessional and unethical conduct."

The court below has held, in effect, that its rule was not intended to, and does not, substitute a perjury prosecution in Iowa Federal Court for the well known avenues by which a Minnesota attorney would otherwise be tried and, if guilty, punished, for unprofessional and unethical conduct.

This interpretation of Local Rule 3 was in accord with the traditional attitude of federal courts, as expressed by the Fifth Circuit:

> "Concededly, the Federal Court has no right to regulate the practice or malpractice of law in the State Courts * * *."

Hancock v. Andrews (5th Cir. 1947), 161 F. 2d 547, 548. In a case some years ago testimony before the federal court in Minnesota showed that one of two attorneys must have been guilty of improper solicitation—and of false swearing to boot. But the federal court left it for the state bar authorities to deal with the situation:

> "The bar of Minnesota has always maintained a high moral and professional standard, and has always jealously guarded its good name. The attorneys mentioned herein are all members of the bar of the Supreme Court of the State of Minnesota, and were admitted to practice in this court on the strength and faith of the certificates issued to them by the Supreme Court of Minnesota, and it is thought by the three judges of this court that a copy of the record in this case, together with a copy of this memorandum, ought to be transmitted to the State Board of Law Examiners of the state of Minnesota for such action as to that body may seem appropriate."

Chunes v. Duluth, W. & P. Ry. Co. (D. Minn. 1924), 29 Fed. 964, 976-7. See also *Chicago, M. & St. P. Ry. Co. v. Schendel* (8th Cir. 1923), 292 Fed. 326, 330.

The present indictment charges false testimony with regard to questions bearing on champerty and maintenance (R. pp. -4). On the trial court's construction of Local Rule 3, these questions will be left to the Minnesota State Board of Law Examiners, and the Minnesota Supreme Court, for resolution. If Local Rule 3 had been construed as giving rise to a perjury prosecution, the following consequences would ensue: (1) the charges would be passed on by an Iowa jury, rather than by members of the Minnesota bar; (2) proof of the charges would be subject to the "two witness rule" and to the "reasonable doubt" test, rather than to the test of "clear and convincing" evidence which applies in disciplinary proceedings; and (3) the Iowa court would have to decide whether appellee was guilty of solicitation and the rest as those terms are understood in Minnesota—compare *United States v. Slutzky* (3rd Cir., 1935), 79 F. 2d 504—rather than leaving this decision to Minnesota authorities conversant with Minnesota understanding of the terms. Neither the public interest, nor that of appellee, would be served by so extraordinary a procedure.

In view of these practical consequences, the district court for the Northern District of Iowa made a rational and wise decision in determining that its rule, useful as it may be for internal purposes, is not "a law of the United States" and that it was not intended that perjury prosecutions should run against lawyers testifying pursuant to the rule. We repeat again what the trial court said in dismissing the indictment:

> "The purpose of the rule was accomplished when Hvass was denied the right to participate in the Wyrum and Lash cases and if disciplinary action against the defendant Hvass is deemed advisable such action should be instituted in the regular manner." (R. 10)

This construction of the rule, by the court which made it and is best qualified to interpret it, has been shown here not to be irrational, but, on the contrary, to be wise and sound. This court should not disturb it.

CONCLUSION

The order below, dismissing the indictment, should be affirmed.

Respectfully submitted,

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